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No. 422

In the Supreme Court of the United States

OCTOBER TERM, 1930

W. W. CUSTER, PETITIONER

v.

ROB B. MCCUTCHEON, SUBSTITUTED FOR F. M. BRESHEARS, DECEASED, UNITED STATES MARSHAL FOR THE DISTRICT OF IDAHO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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v.

ROB B. MCCUTCHEON, SUBSTITUTED FOR F. M. BRESHEARS, deceased, United States Marshal for the District of Idaho

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 17) is not reported. The opinion of the Circuit Court of Appeals (R. 40) is reported in 41 F. (2d) 354.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 9, 1930. (R. 45.) The petition for certiorari was filed September 4, 1930, and was granted on October 20, 1930. (R. 47.) Jurisdic-

tion of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a writ of execution may issue on a judgment for money entered in the United States District Court for the District of Idaho in favor of the United States after a period of five years from the date of the entry of the judgment.

STATUTES AND RULES OF COURT INVOLVED

The statutes and rules of court involved are set forth in the discussion of this case, *infra*.

STATEMENT

On March 7, 1921, the United States recovered judgment against the petitioner in the United States District Court for the District of Idaho, in the sum of $2,086.87. (R. 8.) On September 21, 1929, a writ of execution was issued out of the District Court upon this judgment (R. 9), under which execution the United States Marshal on October 9, 1929, made a levy upon moneys of the petitioner on deposit in a bank at Shoshone, Idaho (R. 8). On October 10, 1929, the petitioner filed a bill in the District Court seeking to enjoin the Marshal from withdrawing the moneys of petitioner on deposit in the bank, and from applying it to the satisfaction of the judgment above described. The bill set forth the facts above stated and alleged that the judgment was unenforceable by reason of the statute of limi-

tations, and that the execution issued thereunder was void. (R. 7–11.) A temporary restraining order was entered by the District Court (R. 13–14), and thereupon the Marshal moved to dismiss the complaint upon the ground that it did not state sufficient facts to entitle the plaintiff to the relief sought (R. 16).

The District Court dismissed the complaint and set aside the temporary restraining order. (R. 20–21.) Upon appeal to the Circuit Court of Appeals this judgment was affirmed. (R. 45.)

ARGUMENT

On March 7, 1921, the United States recovered judgment against the petitioner for $2,086.87 in the United States District Court for the District of Idaho. The question presented is whether a writ of execution may issue on this judgment more than five years after the entry of the judgment.

Section 6910 of the Idaho Compiled Statutes of 1919 provides that—

> The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

Section 916 of the United States Revised Statutes (U. S. C., Title 28, Sec. 727) provides that:

> The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment

debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

Rule 73 of the United States District Court for the District of Idaho, promulgated March 15, 1924, provides:

* * * * *

Subject to the provisions of the acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the State Courts are enforced, and the State laws in relation to executions, sales, exemptions, rights of purchasers, right of judgment creditors and judgment debtors, redemptions, liens of judgments and of decrees and proceedings supplementary to execution as said provisions now exist [or] as they shall exist at the times in question are adopted as rules of this Court; and the Marshal of the Court shall conform his proceedings thereto; * * *.

The petitioner contends that Section 6910 of the Idaho Compiled Statutes is not a statute of limitations, but a statute creating rights, and that by Rule 73 of the United States District Court for the District of Idaho that court, pursuant to the provisions

of Section 916 of the United States Revised Statutes, adopted Section 6910 of the Idaho Compiled Statutes, and accordingly that no execution may issue out of the United States District Court for the District of Idaho more than five years after entry of judgment, even though the United States was plaintiff in the suit. Upon this theory the petitioner seeks to avoid the application of the usual rule that the United States is not bound by state statutes of limitation. It is to be noted that the bill of complaint described the statute as one of limitation. (R. 9.)

The District Court, construing its own rule, held that Section 6910 of the Idaho Compiled Statutes was a statute of limitations, that despite its Rule 73, the United States was not bound by it, and that the United States should have execution more than five years after the entry of judgment. The Circuit Court of Appeals reached the same conclusion. It is submitted that the judgment of the court below was clearly right.

The power of the Federal courts to enforce their judgments by writs of execution does not come to them from any state statutes, but was expressly conferred upon them by Congress. The power to issue writs of execution was originally conferred upon the Federal courts by Section 14 of the Judiciary Act of 1789, c. 20, 1 Stat. 81. This provided that—

> all the before-mentioned courts of the United States, shall have power to issue

> writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

This Court said, in *Wayman* v. *Southard,* 10 Wheat. 1, at page 22:

> The words of the 14th [section] are understood by the court to comprehend executions. * * * On the clearest principles of just construction, then, the 14th section of the judiciary act must be understood, as giving to the courts of the Union, respectively, a power to issue executions on their judgments.

By a subsequent Act "to regulate processes in the courts of the United States" (1 Stat. 93) Congress provided that—

> until further provision shall be made, and except where by this act, or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process * * * in the circuit and district courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme courts of the same.

This latter provision as subsequently modified became Section 916 of the United States Revised Statutes quoted above. It appears, therefore, that since the Judiciary Act of 1789 the United States courts have had power to issue writs of execution.

This power was conferred upon them by Congress, and it does not depend upon state legislation.

At common law, writs of execution in favor of private litigants were required to be sued out within a year and a day after the entry of judgment. 3 Cooley's Blackstone, 2d ed., 419; *Mitchell* v. *Chesnut,* 31 Md. 521; *Bolton* v. *Lansdown,* 21 Mo. 399. If not, the court would conclude *prima facie* that the judgment was satisfied and extinct, but even at common law writs of *scire facias* could be granted to private litigants, after the expiration of one year, requiring the defendant to show cause why the judgment should not be revived. 3 Cooley's Blackstone, 2d ed., 419. But there was no limitation upon the time for the issuance of a writ of execution in favor of the crown, and no writ of *scire facias* was necessary in order to enable the crown to enforce a judgment in its favor. *Coombs* v. *Jordan,* 3 Bland's Chancery (Md.) 284, 324; s. c. 22 Am. Dec. 236, 271. *Anonymous,* 2 Salk, 603. In *Nimmo* v. *Commonwealth,* 4 Hen. & M. 57, s. c. 4 Am. Dec. 488, the Supreme Court of Appeals of Virginia applied the same rule in favor of the commonwealth. The court below held that this rule applied to executions in favor of the United States in the courts of the United States. It seems clear that as the United States succeeded to the favored position of the crown with respect to statutes of limitation, this rule, which obtained at common law in favor of the crown, should likewise be applied

in favor of the United States in the absence of some statutory limitation of the rule by Congress. There is no provision in the United States statutes which in any way limits the time within which executions may be issued in courts of the United States upon judgments in favor of the United States. Congress has provided that executions upon judgments in favor of the United States may run and be executed in any State or Territory, but that they shall be issued from and be returnable in the court where the judgment was obtained. United States Revised Statutes, Section 986. (U. S. C., Title 28, Sec. 839.) This shows an intent to give executions upon judgments in favor of the United States a larger scope than executions in favor of private parties, which only run throughout the State in which the District Court rendering the judgment sits. United States Revised Statutes, Section 985. (U. S. C., Title 28, Sec. 838.)

If the time within which executions may issue on judgments in favor of the United States is governed by the provisions of Section 6910 of the Idaho Compiled Statutes, this could only be regarded as a limitation upon a power of the United States District Court in Idaho, which is otherwise unlimited in time. The effect and purpose of Section 6910 was to enlarge the time within which executions could be issued in favor of private litigants in the state courts from the year and a day allowable at common law to five years. No intention to

restrict the right of the sovereign to have execution upon its judgments at any time is expressed or to be implied. So far as private litigants are concerned, the statute may well be a statute of creation, but if applied to executions upon judgments in favor of the United States in the United States courts, it must be regarded as a true statute of limitations. It was so treated in petitioner's bill. (R. 9.) It would be equally a statute of limitations if applied to executions upon judgments of the State of Idaho. Statutes limiting the time within which executions may be issued have been said to be statutes of limitation and repose. *Livingston* v. *Paxton*, 2 Utah 481. This is plainly what they are.

It is a settled principle that statutes of limitations in general do not bind the sovereign in the absence of express provision that the limitation shall be binding upon the sovereign. This is because of the maxim *quod nullum tempus occurrit regi*. The reason for the maxim is stated by Justice Story in *United States* v. *Hoar*, 2 Mason 311, at page 313, as follows:

> The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects) is to

> be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments.

This principle has been frequently applied to the United States, and the rule is that no statute of limitations binds the United States unless Congress has expressly provided that it should. *Lucas* v. *Pilliod Lumber Co.*, 281 U. S. 245; *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310. Nor is the United States bound by the laches of its officers. *Ches. & Del. Canal Co.* v. *United States*, 250 U. S. 123; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *United States* v. *Kirkpatrick*, 9 Wheat. 720. In the absence of express Congressional authority therefor no state statute of limitation binds the United States. *Ches. & Del. Canal Co.* v. *United States, supra; United States* v. *Insley*, 130 U. S. 263; *United State* v. *Beebe*, 127 U. S. 338; *United States* v. *Nashville, etc., Ry. Co.*, 118 U. S. 120; *United States* v. *Thompson*, 98 U. S. 486.

It would be a strange doctrine, indeed, for the United States to be free to sue without regard to state statutes of limitations and yet be barred by such statutes from enforcing its judgments. The

very purpose of the exemption would thus be defeated.

Section 6910 of the Idaho Compiled Statutes does not even limit the right of the State of Idaho to obtain execution upon a judgment in its favor. The State of Idaho is a sovereign within its boundaries, and the usual rule that the sovereign is not bound by statutes of limitation (unless expressly included) applies to it. *Rhode Island* v. *Massachusetts,* 15 Pet. 233; *Weber* v. *Harbor Commissioners,* 18 Wall. 57; *Armstrong* v. *Morrill,* 14 Wall. 120; *Gibson* v. *Chouteau,* 13 Wall. 92. The inapplicability of Section 6910 of the Idaho Compiled Statutes to the State of Idaho, in a suit in which that State recovers judgment, does not depend entirely upon the application of these general principles. Chapter 250 of the Idaho Compiled Statutes of 1919 imposes limitations upon the time for commencing civil actions, and in Section 6618 (of Chapter 250) there is an express provision that—

> The limitations prescribed *in this chapter* apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties. (Italics ours.)

Section 6910 of the Idaho Compiled Statutes of 1919 is not found "in this chapter" (250) but in Chapter 257, and there is no statutory provision imposing the limitation of Section 6910 upon the state. The Idaho courts have emphasized the words in Section 6618 which we have italicized, and

have held in effect that no limitations, other than those found in Chapter 250, apply to the State of Idaho or its political subdivisions in governmental matters. In *In re Counties* v. *County of Alturas*, 4 Idaho 145, after discussing the application of the maxim *quod nullum tempus concurrit regi*, the court said, at page 151:

> It is a principle of the common law that the government—and therefore, by parity of reasoning, a county—can not be guilty of laches. It is also well settled that a state is not barred by a statute of limitations, unless expressly named. (*Madison Co.* v. *Bartlett*, 1 Scam. 70; *Bank* v. *Brown*, 1 Scam. 107.) Agents of the county are not acting for themselves, but for the county, and therefore the county is not barred by their neglect. (*Bank* v. *Brown, supra.*) As respects public rights or property held for public use upon trusts, municipal corporations are not within the operation of the statute of limitations;

The court also said, at page 153:

> It is contended that sections 4060 and 4061 of the Revised Statutes of Idaho make the statute of limitations applicable to the state and to the counties thereof, and to actions of the character of the one at bar. Section 4060 states: "An action for relief not hereinbefore provided for must be commenced," etc. It will be noticed that all the sections preceding section 4060 apply to actions by or against private individuals for the en-

forcement of a private right or correction of a private wrong, and therefore we must conclude that section 4060 refers to actions of the same character which have not been specially enumerated in the other sections. It would seem to be clear that, if actions of a public nature to enforce the performance of a public duty or obligation were intended to be included in this section the legislature would have said so, as this would include actions of an entirely different nature from those specified in the other sections of the chapter, and, if so construed, would include a large class of cases of which nothing is said in the limitation statutes, and which are clearly not barred by lapse of time. We can not thus undertake to extend the statute, by construction, beyond what the legislature seem to us evidently to have intended. The same is true with reference to section 4061. The state, in the enforcement of a right against private individuals, would not ordinarily be barred, and not at all unless specially named; and therefore section 4061 says (as amended): "The limitations prescribed in this title apply to actions brought in the name of the state, or for the benefit of the state." This section is specifically restricted to the limitations "prescribed in this title"; that is, to actions of a private nature, and against private individuals. To hold that it applied to actions such as the one at bar would seem to be extending the limitation beyond either the words or meaning of the

> statute, and therefore beyond the intention of the legislature. If the court did this in this case, where a public duty is involved and required, why may the court not be called upon to extend the statute to other duties and rights of a public nature, which are not included, and not intended to be included, in the statute of limitations? (*People* v. *Melone*, 73 Cal. 574, 15 Pac. 294.)

While there appears to be no decision by the Idaho courts dealing with the question of whether or not Section 6910 of the Compiled Statutes of Idaho would be binding on the State of Idaho, this decision indicates that the general rule that statutes of limitation do not apply to the State unless such application is expressly provided for, is recognized and enforced in the courts of Idaho.

Since it is clear that even the State of Idaho itself would not be bound by limitations, it is plain that such limitations upon the issuance of executions could not apply to executions issued by the United States courts upon judgments in favor of the United States. Justice Story, in *United States* v. *Hoar, supra*, at page 315, dealing with the application to the United States of state statutes of limitation generally, stated the principle succinctly:

> It is not to be presumed, that a state legislature mean to transcend their constitutional powers; and, therefore, however general the words may be, they are always restrained to persons and things, over which the jurisdiction of the state may be rightfully ex-

> erted. And if a construction could ever be justified, which should include the *United States*, at the same time that it excluded the *State*, it is not to be presumed, that Congress could intend to sanction an usurpation of power by a State to regulate and control the rights of the *United States*. In the language of the act of 1789, it would not be a case, where the laws of the state could apply. The mischiefs, too, of such a construction, would be very great. The public rights, revenue, and property would be subject to the arbitrary limitations of the state; and the limitations are so various in these states, that the government would hold their rights by a very different tenure in each.

It may perhaps be answered that in the instant case there can be no question of power because Congress has adopted the state statute. R. S. 916. We contend that the adoption by the United States of a state statute of limitations expressly made applicable to the State, can not be construed as a limitation upon the sovereignty of the United States unless the adoption is by Congress and Congress has by the terms of the adoption expressly provided that such statute of limitations shall also bind the United States. But even if this were not so, certainly a state statute, not intended as a limitation upon the sovereign which enacted it, can not be a limitation upon the sovereign which adopts it. If the State was excepted from its provisions the United States was also excepted when

its application to private litigants was extended by statute to the United States courts without express provision that it should apply to executions upon judgments recovered by the United States.

Such decisions as there are dealing with the question involved in this case indicate that limitations on the issuance of executions contained in state statutes do not apply to executions upon judgments in favor of the United States. *United States* v. *Noojin,* 155 Fed. 377 (S. D. Ala.), writ of error dismissed, 164 Fed. 692, judgment affirmed, 164 Fed. 1023; *Villescas* v. *Arizona Copper Company,* 20 Ariz. 268; *Swearingen* v. *United States,* 11 Gill & Johns, (Md.) 373.

In petitioner's brief in support of the petition for certiorari (which he also submits on the merits), the petitioner relied principally upon *Fink* v. *O'Neil,* 106 U. S. 272, and *United States* v. *Harpootlian,* 24 F. (2d) 646. These cases are clearly distinguishable and do not govern here.

The sole question in *Fink* v. *O'Neil, supra,* was whether or not the homestead of a judgment debtor was subject to seizure and sale by authority of an execution sued out on a judgment recovered by the United States in a civil action in a Federal court sitting in Wisconsin, under the provision of the Wisconsin statute exempting homesteads from seizure and sale on execution. At the outset of the decision this Court considered whether the exemption would prevail as to judgments in favor of the State of Wisconsin, and concluded that the State would

be bound by the exemption. Construing the Wisconsin statute as exempting homesteads from seizure under an execution issued in favor of the State, this Court held that the adoption of the Wisconsin law by the Conformity Act, operated as an exemption of homesteads from seizure on execution, even in suits by the United States. There is some language dealing with executions generally, but this was *obiter,* and we submit that the basis of the decision was the narrow one indicated above. As we have shown, the State of Idaho is not bound by the limitations contained in Section 6910 of the Compiled Statutes of Idaho, and for the reasons indicated, the United States is not bound thereby.

In *United States* v. *Harpootlian, supra,* the Circuit Court of Appeals for the Second Circuit held that the statute of the State of New York limiting the duration of a judgment lien to ten years was binding upon the United States. The court in that case, however, pointed out that judgments were not liens upon real estate at common law, and that a judgment in favor of the United States could only be a lien upon real estate in the State of New York by virtue of the state statute. Having adopted the statute, the United States had to take the limitation upon the duration of the lien with the benefits of the lien conferred by the state statute. We are not dealing in this case with a right conferred by a state statute, but with the claim that the State has limited a right which it did not, and could not, confer, for the right to issue execution already re-

sided in the United States courts without limitation. This unlimited right of the United States, as a sovereign, which has not been expressly limited by the sovereign itself, continues to exist.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals below should be affirmed.

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